United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig with affidavit of mlg

76-1541

To be argued by
DOUGLAS J. KRAMER

b

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1541

UNITED STATES OF AMERICA,
Appellee,

—against—

E. GARRISON ST. CLAIR,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
DOUGLAS J. KRAMER,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

E. Garrison St. Clair appeals from a judgment of the United States District Court for the Eastern District of New York (Pratt, *J.*) entered on October 15, 1976, convicting him, following a jury trial, of five counts of violating 18 U.S.C. § 1341 (mail fraud) and two counts of violating 18 U.S.C. § 1510 (obstruction of justice), as charged in a nine count indictment.[1] Appellant was sentenced on the mail fraud charges (Counts One, Two, Three, Five and Six) to concurrent sentences of two years, with all but six months suspended, and three years probation. He was sentenced on the obstruction of

[1] Count Four was dismissed by the Government before trial. Count Nine was dismissed by the court on the motion of appellant after the Government rested.

criminal investigation charges (Counts Seven and Eight to concurrent sentences of three years, with two and a half years suspended, and three years probation. The obstruction sentence is to be served consecutively to the mail fraud sentence. Appellant is free on bail pending appeal.

In this appeal, appellant argues that the mail fraud statute does not prohibit the behavior alleged in the indictment, that the evidence was insufficient to support the convictions under the mail fraud counts, that there was insufficient evidence to sustain the convictions for obstruction of criminal investigations, and that certain statements of appellant and their fruits should have been suppressed.

Statement of Facts

Appellant created a scheme to obtain money from several thousand businesses by billing them for listings in an allegedly new business directory, "The 1976 Presidents' Directory of Business and Commerce in the United States, Special Bicentennial Issue" (hereinafter referred to as the "Directory"). However, rather than taking the speculative risk of soliciting orders for this publication, appellant simply billed each of over 2700 firms through the use of invoices and then never printed the Directory or transmitted it to these businesses. Nothing in the billings indicated that they were solicitations of orders for the Directory rather than the invoices which they purported to be.

The fraud began in early December of 1975, when appellant approached the A-1 Duplicating Company in Long Island and ordered the printing of three thousand copies of a business envelope directed to "Accounts Payable", a postage paid, self-addressed reply envelope, and

a letter, all bearing the name of "Presidents' Publishing Systems, Inc." (hereinafter referred to as "Presidents") (45-47).[2] The letter described the Directory, solicited the addressee firm's order, and requested the return of the invoice if the firm was not interested in the Directory. In addition, appellant ordered the preparation of a layout or "mechanical" for an invoice (47). Each invoice billed the firm to which it was directed the amount of $75.00 for a Corporate listing in the Directory and stated, in red letters:

"Important!

Please Remit Within 10 Days
For Inclusion in First Edition"

and

"Proof Sheet Will Follow Receipt Of Remittance"

Subsequently, appellant used the facilities of the A-1 Duplicating Company to mail 2750 business envelopes containing the invoice and the return envelope, but not the solicitation letter, to various corporations and other business entities (50).[3]

Shortly thereafter, Interstate Stores, Inc., Topps Chewing Gum, Inc., ICM Corporation (for ICM Realty), Barbara Lynn Stores, Inc., and Amerace Corp., as well as Todd Shipyards Corp., and Kings Corp., received mailings from Presidents' consisting of an invoice and a reply envelope (31-34, 38-40, 69-71, 73-74, 108-110, 118-121, 123-125). However, none of these businesses ever re-

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[2] Unless otherwise indicated, references are to pages of the trial transcripts.

[3] Sample copies of the business envelope (Gov. Ex. 1), reply envelope (Gov. Ex. 2), letter (Gov. Ex. 4), and invoice (Gov. Ex. 9) are reproduced in the appendix filed with this brief.

ceived the solicitation letter which had been printed by A-1 Duplicating (34, 40, 70, 74, 110, 120-121, 125).

In January of 1976 the United States Postal Inspection Service commenced an investigation of Presidents' (130). On January 8, 1976, the Postal Service placed an administrative "stop" on the mail of Presidents' (156) and on January 23, 1976 entered into a stipulation with Presidents' whereby mail sent to Presidents' would be returned to its senders marked "out of business." (155).[4]

On the 23rd of January 1976, appellant and his counsel attended a meeting at the office of an Assistant United States Attorney in the Eastern District, during which meeting appellant was advised that the Government was considering a criminal investigation of mail fraud (137). During this meeting, appellant stated that Presidents' was his first venture into a mail business, that the company was incorporated in Delaware, that the solicitation letter had in fact been stuffed into the mailings that contained the invoice, and that the stuffing of the envelopes, including the solicitation letter, had been done by himself and three women, Evangelina Rojas, Kari Hopper and Mary Ann Claire (137). Appellant was advised that the Government would interview these three women and that he should take care not to try to influence their testimony, as this might be construed as an obstruction of justice (138). Appellant indicated that he would speak to the three women only to advise them that the Government would be contacting them (138).[5]

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[4] The stipulation settled an administrative proceeding under 39 U.S.C. § 3005 *et seq.* (157).

[5] Subsequent investigation developed that Presidents' was never incorporated in Delaware and had no certificate of doing business on file in New York (138-139). However, Presidents' did reserve a name in Delaware (145).

Shortly after the meeting on January 23, 1976 Ms. Rojas was interviewed. Ms. Rojas, who at the time was living with the appellant (80-81), substantially confirmed the appellant's story about the stuffing of the envelopes and specifically recalled stuffing the solicitation letter into the envelope (141). She also confirmed that Mary Ann Claire and and Kari Hopper assisted in the stuffing (141).[6]

The Postal Inspectors also sought to interview the two other women, Ms. Claire and Ms. Hopper, initially without success (143-145, 152-153). Thereafter, when the two women were located, they both directly contradicted the version of events alleged by appellant and Ms. Rojas (146-147).

Ms. Hopper testified that appellant, an acquaintance for about a year (171), spoke to her and her girlfriend, Mary Ann Claire on the evening of January 23, 1976, at which time he told them that somebody would be contacting them and that he wanted the two women to tell this person that they had stuffed envelopes for him (173-174). Ms. Hopper had never actually done any stuffing for appellant, had never heard of Presidents' and had never seen the solicitation letter or other material which was mailed from A-1 Duplicating (174-175). Ms. Marie Ann Claire testified similarly, stating that she had known appellant for about two years (193). Ms. Claire recalled the appellant requesting her and Ms. Hopper to state that they stuffed envelopes with a return envelope, letter and invoice (194, 213-214). Appellant told Ms. Claire that the matter in question was not "serious" (195-196). As with Ms. Hopper, Ms. Claire had never seen the solicitation letter, invoices, or envelopes before, nor had she

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[6] Ms. Rojas confirmed this version of events at trial (80-88).

ever heard of Presidents' (197). Ms. Claire stated that she had delayed contacting the Postal Inspector after learning that he wanted to speak to her because "I knew where I stood, what I felt, what I did and did not do, and I did not want to face somebody asking me because it would have to hurt somebody that I had been friends with." (206).

Appellant neither testified on his own behalf nor presented any witnesses in his defense. The theory of his defense, implicit in his cross-examination of the Government witnesses and statements by counsel, was that the December 1975 mailing of the 2750 stuffed envelopes constituted a legitimate solicitation of business because each envelope contained a solicitation letter, and that the two women, Ms. Claire and Ms. Hopper, had, in fact, assisted in the mailings, but were now lying about their involvement because of fear of losing their jobs if they did not (e.g. 304-305).

ARGUMENT

POINT I

The indictment charged acts proscribed by Title 18, U.S.C. § 1341.

Appellant's first claim is that the mail fraud counts (One, Two, Three, Five and Six) under which he was charged and convicted did not allege an offense under 18 U.S.C. § 1341, the mail fraud statute. Specifically, it is argued that Congress never intended to criminally proscribe the fraudulent mailing of solicitations disguised as invoices. We submit that the claim is without merit.

In support of his argument, appellant cites the 1970 amendment to 39 U.S.C. § 3001 which added subsection (d). In this amendment, Congress specifically made solicitations disguished as invoices nonmailable unless a certain disclaimer is printed on the face of the invoices.[7] Appellant contends that this amendment is significant because it supplemented the general definition of nonmailable matter, which includes "matter the deposit of which in the mails is punishable under Section . . . 1341 . . . of Title 18 . . . ." 39, U.S.C. § 3001(a). Appellant claims that Congress felt a need to add subsection (d) because it allegedly believed that mailing solicitations disguised as invoices was not punishable under the mail fraud statute and thus 39 U.S.C. § 3001 needed to be expanded. From this, appellant apparently argues, it must be concluded that a fraudulent scheme to obtain money through the use of solicitations disguished as invoices is not proscribed by 18 U.S.C. § 1341. (Appellant's Brief, p. 13 *et seq.*).

However, this argument completely ignores both the difference between the purposes of 39 U.S.C. § 3001 and 18 U.S.C. § 1341 and also the totality of the proof adduced at trial. Section 3001 has as its purpose the protection of the public, not the punishment of the offender, and thus no scienter or intent to defraud is necessary to stop the receipt of proscribed mail. *Lynch* v. *Blount*, 330 F. Supp. 689, 693 (S.D.N.Y.) (3 judge court), *aff'd*, 404 U.S. 1007 (1972). Thus, because the invoices in this case did not contain the required disclaimer, the mailing

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[7] "This is a solicitation for the order of goods or services or both, and not a bill, invoice, or statement of account due. You are under no obligation to make any payments on account of this offer unless you accept this offer." 39 U.S.C. § 3001(d)(2)(A).

Appellant's invoices did not contain the required disclaimer.

of the invoices would have been prohibited even if the solicitation letter had been sent and the mailing done in the utmost good faith. Quite to the contrary, 18 U.S.C. § 1341 makes criminal the participation in a scheme to defraud where the mails are used. E.g. *United States* v. *Finkelstein*, 526 F.2d 517, 526-527 (2d Cir.), *cert. denied*, — U.S. — (1976). Fraudulent intent must be proved. *Pelz* v. *Untied States*, 54 F.2d 1001 (2d Cir. 1932).

In the instant case, appellant was charged, not with mailing solicitations disguised as invoices, but with "knowingly and wilfully devis[ing] . . . a scheme and artifice to defraud various corporations and other commercial entities by means of false and fraudulent pretenses, representations, and promises." Indictment 76 Cr. 246, ¶ 2. The mailing of the invoices was part of the scheme. Appellant used the invoices addressed to "Accounts Payable" to misrepresent "that the corporation and other commercial entities to which the invoices were sent had previously ordered listings in the [Directory.]" Thus, the conduct with which the appellant was charged and for which he was convicted goes far beyond the conduct civilly proscribed by 39 U.S.C. § 3001(d) and falls clearly within the ambit of 18 U.S.C. § 1341.

Finally, appellant seeks support from *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970), for the proposition that his scheme was not a fraudulent one within the meaning of the mail fraud statute. Appellant characterizes his invoices merely as a good faith attempt to solicit sales. Unlike the case in *Regent Office Supply Co.*, however, where false representations were used to secure entree to the purchasing agent, appellant used the false representation on the invoice that an order had been placed to secure entree to the treasury of

the business to which the invoices were sent. The invoices were addressed not to a purchasing department, but to "Accounts Payable"; their aim was not to gain a purchasing agent's attention, but rather the company's money.

POINT II

The evidence was sufficient to support the verdicts under the mail fraud counts.

Appellant challenges the sufficiency of the evidence under Counts One, Two, Three, Five and Six of the indictment, all of which charged violations of 18 U.S.C. § 1341. In particular, he argues that there was insufficient evidence of his intent to defraud, as required under the statute.

In determining whether there was sufficient evidence to sustain a verdict, the court will view the evidence in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60 (1942), and will construe all permissible inferences in the Government's favor. *United States* v. *Marchisio*, 344 F.2d 653, 662 (2d Cir. 1965); *United States* v. *Dardi*, 330 F.2d 316, 325 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964).

The evidence adduced at trial showed that appellant caused three thousand copies of an invoice, two envelopes, and a solicitation letter to be printed. He then proceeded to mail the invoice and a return envelope to the "Accounts Payable" departments of some two thousand seven hundred and fifty corporations and companies. The solicitation letter was not included in these mailings.

When appellant was confronted with the fact of the mailings, he repeatedly maintained that he had sent the

solicitation letters with the invoices, and he gave the names of three women whom, he stated, had assisted him in preparing the envelopes for mailing. Two of these women, Ms. Hopper and Ms. Claire, testified that they had never stuffed any envelopes for appellant and, more significantly, that appellant had sought them out and had requested that they lie concerning their involvement in his enterprise; specifically, that they state that they had stuffed the envelopes for him and had placed the solicitation letter in the envelopes.

Based on these facts, we fail to see how it can be argued that the Government did not prove an intent to defraud.

To be rejected at the very outset is appellant's claim that the "fact" that he intended to publish a directory at a later date bars any finding of intent (Appellant's Brief, p. 17). Quite simply, it was never established at trial that appellant intended to print either proof sheets or, ultimately, a directory. The only, and, indeed, very slim evidence of his intent in this respect was a statement by Florence Gabler, appellant's printer, that appellant inquired if the printer could handle such a job as a directory (57-58). No further inquiry was made.

Moreover, fraudulent intent need not be established by direct proof; it may be inferred from the statements and conduct of a defendant. *United States* v. *Sheiner*, 273 F. Supp. 977, 982 (S.D.N.Y.), *aff'd*, 410 F.2d 337 (2d Cir.), *cert. denied*, 396 U.S. 825 (1968); *United States* v. *Sullivan*, 406 F.2d 180, 186 (2d Cir. 1969). Appellant's fraudulent intent was proven not only by the fact that he caused several thousand phony solicitation letters to be printed, but that he made false exculpatory statements concerning those letters. Appellant stated to the Postal Inspector that the letters had been sent and

he stated to the Postal Inspector and an Assistant United States Attorney that certain named individuals aided him in preparing the letters for mailing. He also approached two of the individuals, Ms. Hopper and Ms. Claire, and sought to procure their false testimony concerning the letters. Cf. *United States* v. *Parness*, 503 F.2d 430, 438 (2d Cir.), *cert. denied*, 419 U.S. 1105 (1975).

Appellant also argues that the Government failed to offer adequate evidence to prove that the solicitation letters were not in fact mailed. Seven witnesses from seven commercial recipients of appellant's mailing testified. Each testified that it was the normal and regular practice in his respective company for the mail to be opened in the mail room and then forwarded to him (E.g. 33-34, 39-40). None of the witnesses received the solicitation letter. Appellant contends that too few witnesses were presented to establish the fact of non-receipt and that the testimony which was presented was hearsay.[8] However, evidence concerning the routine procedures used by the recipient companies to handle their mail was admissible and set the foundation for the admission of the contents of the envelopes mailed by appellant under Fed. R. Evid. 406. Significantly, while appellant objected to the testimony of the witnesses concerning the regular procedures of their mailrooms, he did not object to the admission into evidence of the contents of the envelopes which each received, nor did he object to testimony that the solicitation letter was not received.

Proof that the solicitation letters were not mailed does not, of course, rest solely on the testimony of the re-

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[8] It should be noted that the appellant objected to similar act testimony by recipients not named in the indictment (115-118).

cipients. Equally probative were appellant's efforts at securing the false statements concerning the letters. The appellant's actions, together with the non-receipt of the letters, clearly belied any claim that the solicitations were actually mailed.

The evidence thus showed that appellant mailed almost three thousand invoices to the "Accounts Payable" department of numerous corporations and other commercial entities, invoices which on their face appeared to be nothing other than billings for an item previously ordered. The evidence also showed that appellant printed three thousand letters which indicated that the mailings were solicitations, not billings; that appellant never mailed these letters; but that he relied on them when questioned by the Postal Authorities. And, as the issue drew to a head, appellant attempted to induce two female friends to lie concerning the mailings of this letter. Viewed in its totality, the evidence was clearly sufficient to sustain the mail fraud verdicts.[9]

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[9] Appellant claims an error in the court's charge concerning the issue of whether appellant intended to provide proof sheets (Appellant's Brief pp. 29-30). However, appellant does not indicate to what portion of the charge he objects. In any case there was no objection to any relevant portion of the charge and thus, absent plain error, such claim cannot be raised on appeal. *United States* v. *Santiago*, 528 F.2d 1130 (2d Cir.), *cert. denied* — U.S. — (1976). The Court's charge on this issue is set forth below (335):

> Now, 6(c) relates to the proofsheets. There are several exhibits I am looking at. I think this is Exhibit 10, but it is a little hard to read here; it may be Exhibit 9. In any event, you see the invoice; there are several copies of them. They have printed on them, in red, proofsheet will follow receipt of remittance. Now that is an expression, promise, or representation which the defendant does not claim he did not make. Now, whether or not that is

[Footnote continued on following page]

POINT III

There was sufficient evidence to support the verdicts of guilty under the obstruction of justice counts.

As noted above, at a meeting which took place on January 23, 1976, in the office of an Assistant United States Attorney, appellant, with his lawyer present, stated that the solicitation letter had in fact been included in the mailings along with the invoice and that the envelopes had been stuffed by himself and three women, Kari Hopper, Mary Ann Claire and Evangiline Rojas. Appellant had previously been advised that the Government was considering a criminal investigation and, after receiving the names of the women, the prosecutor told appellant that the women would be interviewed. On the evening of the same day, appellant approached Ms. Hopper and Ms. Claire and told them that an unidentified person would be contacting them (194-195). He asked the women to say that they had stuffed envelopes for him, placing a return envelope, a letter and an invoice in the envelope (194). Upon being rebuffed by the women, appellant became upset and "made it seem like it was not important or a serious thing, but it was important to him . . . ." (195).

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a fraudulent representation depends upon whether you find that when he mailed this out, he intended to send the proofsheets when he got the money back from the various addresses.

If you find that he intended to mail the proofsheets, then this would not be a fraudulent representation. If you find that he did not intend to mail them, then you may find that this document with the red printing on it, that the proofsheet will follow receipt of remittance, you may find that that is a fraudulent misrepresentation.

Thereafter Ms. Hopper and Ms. Claire received business cards from Tom Johnson, the Postal Inspector, asking them to get in contact with him concerning Presidents' (176, 200). They did not contact Mr. Johnson. Ms. Hopper stated that she did not respond because "I was flying and very busy, and I had no idea what was going on. I had no idea of the magnitude of the thing" (176). Ms. Claire stated:

> "The reason I did not immediately contact Mr. Johnson was because I know where I stood, what I felt, what I did and did not do, and I did not want to face somebody asking me because it would have to hurt somebody that I had been friends with.' (206).

As a result of his telling the women to lie for him, appellant was charged in Counts Seven and Eight of the indictment with wilfully endeavoring by means of misrepresentation to obstruct, delay, and prevent the communication by Kari Hopper and Mary Ann Claire of information relating to a violation of a criminal statute to a criminal investigator.[10]

Appellant argues that under the facts proved, the Government did not establish a violation of 18 U.S.C., § 1510.[11] We disagree, for the evidence clearly shows that the appellant endeavored to delay or prevent the communication by the two women of the true facts of their

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[10] The ninth count relating to Evangiline Rojas was dismissed. The opinion supporting this dismissal is reported as *United States* v. *St. Clair*, 418 F. Supp. 201 (E.D.N.Y. 1976).

[11] 18 U.S.C., § 1510(A) provides *inter alia*, that it shall be a criminal offense to willfully endeavor "by means of . . . misrepresentation . . . to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator . . . ."

involvement in the mail fraud scheme. This endeavor was carried out by means of appellant's misrepresentation of the significance and importance of the information relating to the stuffing of the envelopes.

Section 1510 of Title 18 was designed primarily to protect informants and witnesses against intimidation or injury by third parties. E.g. *United States* v. *San Martin*, 515 F.2d 317 (5th Cir. 1975), see 1967 U.S. Code Cong. Admin. News 1760, 1762. Congress included, though, within the prohibited means of endeavor the term "misrepresentation" and House Report No. 658 stated:

> "Your committee wishes to make abundantly clear the meaning of the term 'misrepresentation' as used in this act . . . [I]t is also our intention that procurement of a witness' communication or silence to a Federal investigator by means of a misrepresentation on the part of the procurer is also covered under the act."

1967 U.S. Code Cong. Admin. News, *supra* at 1762.[12] In *United States* v. *Fraley*, 538 F.2d 626, 627 (4th Cir. 1976), the Fourth Circuit determined that the primary purpose of the statute was to keep unobstructed the communication of information to a criminal investigator.

Appellant initially attacks the § 1510 verdicts on the grounds that there was no criminal offense to be investigated. However, as the facts and our arguments in Points I and II demonstrate, the existence of the mail fraud scheme was fully established. And in any event, section 1510 was applicable here for the additional and sole reason that when appellant approached the women

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[12] The term "endeavor" was defined to mean "any effort or essay to accomplish the evil purpose." *Id.*

there clearly was an investigation into a criminal offense in progress.[13] See *United States* v. *Williams*, 470 F.2d 1339, 1343 (8th Cir.), *cert. denied*, 411 U.S. 936 (1973).

Appellant also argues that there was no proof of an "attempt" by the appellant to delay or prevent a communication (Appellant's Brief, p. 34). Section 1510 refers to "endeavor" rather than "attempt". See pg. 15, ft. nt. 11, *supra*. Evidence of appellant's endeavor is to be found in the manner in which he approached the two women after having asserted to the Assistant United States Attorney that the women assisted him. By misrepresenting the significance and importance of the information and by attempting to get the women to lie, the appellant was trying to secure either their false statements or their avoidance of any interview at all.

While the defendant's success is not itself a prerequisite for conviction, *United States* v. *Carzoli*, 447 F.2d 774, 778 (7th Cir. 1971), it should be noted that in the instant case appellant did succeed in delaying the communication of the true facts of the women's involvement in his mail fraud scheme by placing them in the highly uncomfortable position of having to choose between maintaining their integrity and possibly injuring a friend.

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[13] It was conceded by appellant that the Postal Inspector Johnson was a criminal investigator within the meaning of 18 U.S.C. § 1510(b) (354).

POINT IV

The District Court correctly denied appellant's motion to suppress all evidence obtained by the Government at the January 23, 1976 meeting.

Prior to trial, appellant moved to suppress all evidence gathered by the Government as a result of information supplied by appellant at the meeting on January 23, 1976 in the office of the Assistant United States Attorney in the Eastern District of New York. Appellant claimed that he was induced to incriminate himself during this meeting and that, because of the incompetency of his counsel, he did not make a knowing and intelligent waiver of his right against self-incrimination. Hence, it was argued, evidence obtained by the Government as a result of statements made by appellant during the meeting (specifically concerning Ms. Hopper and Ms. Claire) should have been suppressed. (Appellant's Brief, p. 36).

Following a pre-trial hearing during which several Assistant United States Attorneys, appellant, and appellant's attorney, Mr. Sands, testified, the court denied the motion.[14] Appellant now raises the same argument on appeal. We believe the contention borders on the frivolous.

Appellant concedes that because he was not in custody on January 23, 1976 the Government was under no obligation to give him *Miranda* warnings. (Appellant's Brief, page 36).[15] Nevertheless, he claims that the at-

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[14] The Court's opinion is set forth in the minutes of the pre-trial proceedings on July 26, 1976, pp. 112-118.

[15] Assistant United States Attorney Ronald DePetris testified that he warned both appellant and appellant's attorney that a criminal investigation would be conducted (pre-trial minutes of July 26, 1976, testimony of Ronald DePetris pp. 20-21, 22-24).

torney who was then representing him, Mr. Sands, had an obligation to inform appellant of his rights.

The meeting in question on January 23, 1976 occurred following an in-court settlement of a civil proceeding, *United States Postal Service* v. *Garrison St. Clair d/b/a President's Publishing Systems, Inc.*, 76 C 157 (E.D. N.Y.). The civil proceeding involved a preliminary injunction, pursuant to 39 U.S.C. § 3001 *et seq.*, stopping appellant' mail pending the outcome of an administrative proceeding commenced by the Postal Service (see Statement of Facts, *supra*, at p. 4). On the 23rd of January 1976, appellant agreed to discontinue his business, and the Postal Service agreed to terminate its administrative action. Thereafter, a meeting took place in the office of Assistant United States Attorney DePetris, during which appellant and his attorney were told that a criminal investigation was being commenced and whether or not there would be a prosecution depended largely on whether the solicitation letter was, in fact, mailed with the invoices (Pre-Trial minutes 7/26/76, testimony of Ronald DePetris, pp. 20-21). Appellant then volunteered the information about the women whom he alleged had assisted him in preparing the mailing.

In the context of the above proceedings, it is instructive to note what appellant's attorney told the appellant concerning the divulging of the information about the women:

> Mr. Michelman: What did you say to [appellant] and what did he say to you, relative to further information which the Government wanted sir?
>
> Mr. Sands: I told Mr. St. Clair in my opinion the best thing he could do is cooperate with the Government fully, to send back the checks that he

> had received that amounted to about $1800. I also told him that the two girls that he was talking about, they will substantiate what he says, he ought to give me their names. I will give them to the U.S. Attorney's Office. They will investigate it and then I will talk to him about dropping any prosecution . . . ."

(Pre-trial minutes, July 26, 1976, testimony of Sands, p. 55).

Appellant claims that his attorney was incompetent because, apparently believing that appellant had highly probative exculpatory evidence, he advised his client to volunteer the information in the hope of forstalling a prosecution. Of course, Mr. Sands was unaware that his client was lying and would attempt to induce the women whom he named as assistants to lie to the Postal Inspector. It does Mr. Sands an injustice to characterize his conduct as incompetent and his representation could hardly be called a "farce and mockery of justice", the standard to be applied in challenges of this sort. *United States ex rel. Marcelin* v. *Mancusi*, 462 F.2d 36, 42 (2d Cir.), *cert. denied*, 410 U.S. 917 (1973). See also *Rickenbacker* v. *The Warden, Auburn Correctional Facility*, — F.2d — (2d Cir., decided December 22, 1976); *United States* v. *Joyce*, 542 F.2d 158 (2d Cir. 1977).[16]

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[16] The totally unappealing nature of appellant's argument becomes even more apparent when it is remembered that even if appellant had come into the prosecutor's office without an attorney the Government would not have been required to give him any *Miranda* warnings. *Oregon* v. *Mathison*, — U.S. —, 45 U.S.L.W. 3500 (January 25, 1977). Appellant cannot now profit from the fact that he was represented by counsel when he spoke to the prosecutor.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
March 2, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
DOUGLAS J. KRAMER,
Assistant United States Attorneys,
Of Counsel.

★ U. S. Government Printing Office 1976— 714—018—064

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Joanne Bracco being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 4th day of March 19 77 he served a copy of the within

Brief for Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Harvey J. Michelman

250 W. 57th Street

New York, N.Y. 10019

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Joanne Bracco

Sworn to before me this

4th day of March 19 77

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4613298
Qualified in Queens County
Term Expires March 30, 19 77